SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1668

UNITED STATES OF AMERICA
ex rel. MAMDOUH BARBOUR,

Petitioner,

v.

DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, SAN ANTONIO, TEXAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Mamdouh Barbour, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit which affirmed a judgment of the District Court refusing to issue a writ of habeas corpus herein.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) is unreported and was filed on March 21, 1974. Its judgment of affirmance was filed on the same day (Appendix B). The opinion of the District Court, filed on January 23, 1973, is unreported (Appendix C).

JURISDICTION

The judgment of the Court below was entered on March 21, 1974. The jurisdiction of this Court is conferred pursuant to 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Is the denial of bail to an alien in deportation proceedings upon the basis of confidential information a violation of due process and the Eighth Amendment?

2. Is the Board of Immigration Appeals upon appellate review authorized by statute and regulations to receive and utilize confidential information (not introduced at the Special Inquiry hearing) to deny bail to an alien in deportation proceedings?

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law * * *."

The Eighth Amendment to the Constitution of the United States provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Section 103(a) of the Immigration and Nationality Act [8 U.S.C. 1103(a)] provides in part:

> "The Attorney General shall be charged with the administration and enforcement of this Act and all other laws relating to the immigration and naturalization of aliens * * *."

Section 242(a) of the Immigration and Nationality Act [8 U.S.C. 1252(a)] provides in part:

> "Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. Any such alien taken into custody may, in the discretion of the Attorney General and pending such final determination of deportability, (1) be continued in custody; or (2) be released under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (3) be released on conditional parole."

8 C.F.R. 3.1(d) provides in part:

> "* * * the Board shall exercise such discretion and authority conferred upon the

Attorney General by law as is appropriate and necessary for the disposition of the case."

8 C.F.R. 3.1(g) provides in part:

"Except as they may be modified or overruled by the Board or the Attorney General, decisions of the Board shall be binding on all officers and employees of the Service in the administration of the act * * *."

8 C.F.R. 242.2(a) and (b) provides in part:

"A respondent on whom a warrant of arrest has been served may apply to the district director, acting district director, or deputy district director for release or for amelioration of the conditions under which he may be released. The district director, acting district director, or deputy district director, when serving the warrant of arrest and when determining any application pertaining thereto, shall furnish the respondent with a notice of decision, which may be on Form I-286, indicating whether custody will be continued or terminated, specifying the conditions, if any, under which release is permitted, and advising the respondent appropriately whether he may apply to a special inquiry officer pursuant to paragraph (b) of this section for release or modification of the conditions of release or whether he may appeal to the Board * * *.

"(b) *Authority of special inquiry officers; appeals.* After an initial determination pursuant to paragraph (a) of this section, and at any time before

a deportation order becomes administratively final, upon application by the respondent for release from custody or for amelioration of the conditions under which he may be released, a special inquiry officer may exercise the authority contained in section 242 of the Act to continue or detain respondent in, or release him from, custody, and to determine whether a respondent shall be released under bond, and the amount thereof, if any * * *. The determination of the special inquiry officer in respect to custody status or bond shall be entered on Form I-34[illegible] at the time such determination is made and shall be accompanied by a memorandum by the special inquiry officer as to the reasons for his determination. The special inquiry officer shall promptly notify the respondent and the Service of such determination. Consideration under this paragraph by the special inquiry officer of an application or request of an alien regarding custody or bond shall be separate and apart from any deportation hearing or proceeding under this part, and shall form no part of such hearing or proceeding or of the record thereof. The determination of the special inquiry officer as to custody status or bond may be based upon any information which is available to the special inquiry officer, or which is presented to him by the alien or the Service. The alien and the Service may appeal to the Board of Immigration Appeals from any such determination * * *."

STATEMENT

Petitioner, a native of Syria, 42 years of age, seeks his release from detention in deportation proceedings. He has been detained since May 24, 1972, when he was charged with entry into the United States on March 4, 1972, without a valid passport. In his deportation proceedings, petitioner applied for a stay of deportation under 8 U.S.C. 1253(h) upon the ground that he would be persecuted if returned to Syria. On November 24, 1972, the Board of Immigration Appeals remanded this aspect of the case to the Special Inquiry Officer for further proceedings. At the same time on November 24, 1972, the Board in a separate opinion refused to release petitioner upon the ground that he is a security risk. The Board's opinion states (R. 6):

> "We have before us a letter dated October 27, 1972, from the Office of Refugee and Migration Affairs of the Department of State, recommending that the respondent not be set free on bail. The recommendation is based upon the respondent's statement that he had been assigned to serve with SAIQA, the Syrian-supported military arm of the Palestinian resistance movement. The letter states that the respondent's involvement with SAIQA was confirmed by 'intelligence sources.' The 'intelligence sources' are not identified, and the letter bears no restrictive classification. On the basis of this information, we hold that the respondent's release on bond would endanger the national security of the United States.
>
> "In addition, we have received other material regarding the respondent that bolsters our judgment that his release on bond would endanger

> the national security of the United States. That material is in the form of classified, information specifically required by Executive Order 11652 to be kept secret in the interest of national defense or foreign policy."

The State Department letter was received by the Board *ex parte* and after oral argument. Petitioner was never confronted with the security risk issue at his hearing.[1] It was raised for the first time after oral argument before the Board of Immigration Appeals. During such oral argument the Service Attorney conceded that there was no security risk (R. 16). Petitioner was arrested and detained by the District Director of the Immigration Service because of a charge that he embezzled a large amount of Syrian funds while he was a Syrian army officer. (Letter of District Director to State Department of August 14, 1972). This letter stated (R. 229):

> "In view of the seriousness of the charges pending against subject in Syria, it was determined that he should be detained in custody of this Service without bond pending a final determination of deportability."

Upon appeal to Special Inquiry Officer Winters, bond was denied on June 6, 1972, with this statement (R. 68-69):

> "I am going to order that the change in custody be denied at this time. The record shows the respondent has used different

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[1] In his petition herein (par. 12), petitioner asserts that he has never engaged in or advocated terroristic or subversive tactics. At a reopened deportation hearing on April 9, 1973, the Syrian Chief of Interpol testified that petitioner was not a terrorist.

identities, fraudulent documents. He does not have any close relatives or property in the United States, although it was pointed out that the money that he has in banks might be held in some way, and he would not leave his money, but then, of course, we do not know at this time how many other banks he might have money in in other countries and what the risk is, and I would hesitate today in setting what I consider to be an intelligent bond in the case for his release under bond. I wouldn't know whether to make it a thousand dollars or a hundred thousand, and because of the indication that we will be able to proceed with a prompt hearing and at that time know more concerning all the matters in the case, I am going to order that the request for a change in status be denied. Of course there is an appeal from that to the Board of Immigration Appeals, if either the Government or the attorney for respondent wants to appeal at this time. If anything should change, or if nothing should change in the matter, he would still be detained under the same conditions, with no further information, in a period of, say, thirty days, I feel sure something else would be decided, something else would be done, if there is no more adverse evidence against him than we have at this time."

Upon a further appeal to Special Inquiry Officer Craig on October 5, 1972, that official merely concluded, without findings, that there was "no justifiable reason for releasing respondent or making a change in custody status

while the question of deportability is pending before the Board of Immigration Appeals" (R. 25).

Upon appeal to the Board of Immigration Appeals, the Immigration Service attorney admitted that there was no security issue in the case (R. 16) and that the Special Inquiry Officer "may not have delineated in detail what his thinking was as to why the man should continue to be detained" (R. 13).

The Board of Immigration Appeals ruled that whether petitioner was a good bail risk on non-security grounds was questionable and without deciding to remand for development of further facts, denied bail solely on security grounds (R. 2-7).

The decision of the Board of Immigration Appeals was an exercise of the authority of the Attorney General in whom Congress vested the administration of the immigration laws. 8 U.S.C. 1103; 8 C.F.R. 2.1(d). Its decision was binding upon all employees of the Immigration and Naturalization Service, including the Special Inquiry Officer. [8 C.F.R. 3.1(g)].

Petitioner sought review by habeas corpus. The District Court rules on January 23, 1973, that petitioner was not a security risk but that he should be denied bond because he was a non-security bail risk. The District Court stated that it based its decision not upon the ruling of the Board of Immigration Appeals but "upon the evidence presented to the Special Inquiry Officer from which he determined petitioner was not a good bail risk."

Upon appeal, the Court of Appeals affirmed, ruling that it was proper for the Board of Immigration Appeals to consider confidential information and that its denial of bail

was an act of discretion which was sufficiently supported by some evidence. The confidential information which petitioner has never seen was utilized by the Court of Appeals *in camera*.

REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI

Unlike excluded persons of foreign nationality, *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), aliens within the United States are protected by the due process requirements of the Fifth Amendment. This includes those subject to deportation proceedings. *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950); *Chew v. Colding*, 344 U.S. 590 (1953). Aliens within the United States are likewise beneficiaries of the protection afforded by the Eighth Amendment. *Carlson v. Landon*, 342 U.S. 524 (1952); *United States ex rel. Pirinsky v. Shaughnessy*, 177 F.2d 708 (2nd Cir., 1949).

The detention of petitioner within the United States in deportation proceedings upon the basis of secret evidence not the subject of confrontation or cross-examination violates due process, *Han-Lee Mao v. Brownell*, 207 F.2d 142 (D.C. Cir., 1953), as well as the Eighth Amendment. Due process includes the right to notice, an opportunity to be heard at a meaningful time and in a meaningful way. *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Bell v. Burson*, 402 U.S. 535 (1971); *Fuentes v. Shevin*, 407 U.S. 67 (1972). Petitioner was granted none of these rights. Contrary to these constitutional principles and in conflict with the Han-Lee Mao case, the Court below determined that it was appropriate and proper to detain petitioner in deportation proceedings upon the basis of confidential information

never disclosed to him. This ruling merits review by the Supreme Court.

2. Neither the applicable statutory provisions, 8 U.S.C. 1252(a), of the Immigration and Nationality Act, nor the regulations, 8 C.F.R. 242.2(b), specifically confer authority upon the administrative authorities to utilize confidential information in denying release on bond in a deportation case. In particular, no such authority is delegated to the Board of Immigration Appeals. Significantly, where authority is granted to utilize confidential information, there is a requirement of a prior finding that disclosure would prejudice the public interest, safety or security, 8 U.S.C. 1225(c); *Jay v. Boyd*, 351 U.S. 345 (1956). No such finding was made here. The applicable regulations merely provided for the use of "available" information by a Special Inquiry Officer at the hearing level, 8 C.F.R. 242.2(b). This is most peculiar and ambiguous language to base authority for the Board of Immigration Appeals to utilize secret information upon appeal from a Special Inquiry Officer's bond denial reached upon evidence fully disclosed on the record. Moreover, as we note above, since the regulations, as interpreted below, run afoul of the Fifth and Eighth Amendments, they should not be so interpreted.

CONCLUSION

The issues presented here are fundamental ones pertaining to constitutional rights of aliens to fairness, due process and guarantees under the Eighth Amendment. They deserve this Court's review.

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APPENDIX A

1850 **U. S. EX REL. BARBOUR v. DISTRICT DIR., ETC.**

Appeal from the United States District Court for the Western District of Texas.

Before WISDOM, COLEMAN and SIMPSON, Circuit Judges.

WISDOM, Circuit Judge:

In this tangled case we review the denial of a petition for a writ of habeas corpus to an alien who was refused release on bail pending a final decision in deportation proceedings. A Special Inquiry Officer denied bail to the petitioner, Mamdouh Barbour, an alien, on the ground that he was a bad bail risk. On appeal the Board of Immigration Appeals did not rule on the question whether Barbour was a bad bail risk but, on information submitted by the State Department, denied bail on the ground that Barbour represented a threat to national security. Barbour then petitioned for a writ of habeas corpus in federal court. After reviewing *in camera* confidential information relating to national security, the district court stated that "for the record" Barbour was not a security risk, but was a bail risk. The court denied the petition for habeas corpus. We agree with the result: detention of this petitioner without bail is lawful.

Barbour is a citizen of Syria, a Major in the Syrian Army. On February 10, 1972, he left Syria, went to Lebanon, then to Turkey, and eventually entered Canada on February 19, 1972. In Canada he deposited approximately $115,000 in four different banks. There, Barbour applied for a non-immigrant visa and was granted permission to enter the United States. In support of his application for the visa, Barbour submitted a fraudulent passport issued by the Imamate of Oman State to

Yousef S. Risk, showing that he was a native of Lebanon and a citizen of Jordan. He crossed the border from Canada into the United States on March 4, 1972.

Subsequent to Barbour's entry into this country, the Syrian Government, through Interpol, informed United States' au-

thorities of Barbour's true identity and also of an arrest warrant issued in Syria against him for escape abroad, violation of military instructions, and misappropriation and smuggling of two million Syrian pounds—the equivalent of approximately $450,000. The Immigration and Naturalization Service apprehended Barbour on May 24, 1972, in Arlington, Texas, and began deportation proceedings.

The Syrian Government contends that as vice-head of the finance and administrative department of his army unit Barbour embezzled the funds and, fearing that the theft would be discovered upon his imminent change of assignment, fled the country. Barbour disputes these contentions. He insists that he left Syria with no more than $131,000, most of it inherited from his father, the rest representing the proceeds from his property in Syria. He contends that $115,000 is now frozen by court order in Canadian banks at the instance of Syrian authorities and that he has spent almost all of the remainder. He also contests the Syrian version of the circumstances under which he fled the country. He maintains that he was imprisoned under barbarous conditions for 45 days beginning in 1971 for refusing to give information to a Soviet army officer. Although he was promoted from Captain to Major after this incident, allegedly he was given a dangerous assignment with SAIQA. SAIQA is the Syrian supported military arm of the Palestinian resistance and is said to have connections with world-wide terrorist organizations. Barbour asserts that he tried to resign from the army but that his resignation was not

accepted; that he was never involved with SAIQA or in sympathy with that organization, and was assigned to it as a punishment. Finally, Barbour maintains that he is a member of the Druse sect that exists in Syria and Israel, and is persecuted in Syria; that rumors are being spread in Syria that he is pro-Israel and anti-Soviet; that his father was killed for his opposition to the Syrian Government; and that, because like his father he opposes the Government, he fears that if returned to Syria he will be executed for his political

beliefs. The Immigration and Naturalization Service takes a skeptical attitude toward Barbour's explanation, because he was promoted to Major after the episode with the Soviet officer and because he sought asylum only after he was arrested. Although the $115,000 in Canada is frozen, there is still $285,000 to be accounted for, assuming the correctness of the Syrian Government's figures.

The procedural history of Barbour's case since he was taken into custody has been a roller coaster ride of motions, denials, and appeals. He has applied for political asylum and sought to have deportation withheld, arguing that if deported to Syria he faces persecution. Twice the Office of Refugee and Immigration Affairs of the State Department has advised that a case for persecution has not been made. Twice a Special Inquiry Officer (now an Immigration Judge) has determined the persecution issue against Barbour and has ordered him deported. The Board of Immigration Appeals has entertained this issue once. According to the record before us, no "final order of deportation" within the meaning of Section 242(c) and (d) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1252(c) & (d), has yet been rendered. See 8 C.F.R. 242.20 (1973) and 8 C.F.R. 243.1 (1973).

Special Inquiry Officers have twice dealt with the issue raised in this case—the legality of continuing Barbour in custody without bail. A custody hearing was held before a Special Inquiry Officer on June 6, 1972. At the close of the hearing the Officer ruled against permitting Barbour to be released on bail:

> "I am going to order that the change in custody be denied at this time. The record shows the respondent has used different identities, fraudulent documents. He does not have any close relatives or property in the United States, although it was pointed out that the money that he has in banks might be held in some way, and he would not leave his money, but then of course we do not know at this time how many other banks he might have money in in other

> countries and what the risk is, and I would hesitate today in setting what I consider to be an intelligent bond in the case for his release under bond. I wouldn't know whether to make it a thousand dollars or a hundred thousand, and because of the indication that we will be able to proceed with a prompt hearing and at that time know more concerning all the matters in the case, I am going to order that the request for a change in status be denied."

This custody determination was reconsidered and affirmed on October 5, 1972, by another Special Inquiry Officer, who stated: "[T]here appears to be no justifiable reason for releasing the respondent or making a change in his custody status while the question of his deportability is pending before the Board of Immigration Appeals."

Barbour appealed the October 5 determination to the Board of Immigration Appeals. In the argument before the Board

on October 17, 1972, the issue was whether Barbour represented a bail risk. Counsel for the Immigration and Naturalization Service conceded at that time that Barbour did not represent a security risk. On October 27, 1972, while the case was under advisement, the Board received correspondence, including classified information, from the State Department recommending that Barbour not be set free on bail. On the basis of this new information, the Board held on November 24, 1972, that Barbour's release from custody would endanger the national security of the United States. Barbour's appeal was dismissed on this ground which, of course, he had no opportunity to contest and could not anticipate since the argument had centered on whether Barbour was a bail risk. The Board declined to rule on the bail risk issue, stating: "At best it is questionable whether this respondent is a good bail risk or not."

Barbour petitioned for a writ of habeas corpus. The classified national security information on which the Board of Immigration Appeals had based its decision was forwarded to the district court. The district judge viewed the information

in camera and found that those documents and the record failed to establish that Barbour represented a security risk. A review of the record as a whole, however, convinced the district court that the evidence upon which the Special Inquiry Officers based their decisions established that Barbour was not a good bail risk. The court considered the following factors in denying bail. (1) Barbour was in the country illegally. (2) He had deceived the American Consul in his application for a non-immigrant visa and had assumed a false name. (3) He had entered the United States surreptitiously and revealed himself as a person "likely to conceal himself within the society". (4) In fact, he had concealed himself

within the society. (5) He had no family or roots in the United States. (6) He had no employment record here. (7) He was charged with embezzling more than $450,000 from the Syrian Army, (8) desertion from the Syrian Army, and (9) smuggling money abroad. (10) A substantial amount of cash was unaccounted for which might be used to help Barbour abscond. On these findings the district court concluded that there was substantial evidence to support the Special Inquiry Officers' determination. Accordingly the court denied the writ of habeas corpus.

[1-3] If the Board had adopted the findings of the Special Inquiry Officers, this Court would have to agree that the evidence supports the holding that Barbour was a bail risk. But the Board pitched its decision on its conclusion that Barbour was a security risk.[1] The district court's holding, therefore, collides with the principle that the issue for judicial review of an agency's action is the issue decided by the agency. S. E. C. v. Chenery, 1943, 332 U.S. 194, 196, 67 S.Ct.

1575, 1760, 91 L.Ed. 1995. As this Court stated in N. L. R. B. v. Clark, 5 Cir. 1972, 468 F.2d 459, 467:

> "It is well settled that the reasons actually advanced by an administrative agency are the only reasons properly considered by a court in determining the legality of the agency's action."

1. We note that in further proceedings initiated by Barbour during the pendency of this appeal the Board has reconsidered the bail risk issue. On October 2, 1973, based on an augmented record, the Board declared that "in light of all the evidence adduced in the bond and [persecution] proceedings, and for the reasons given by the District Court in its decision on the earlier request for release on bond, we find that the respondent is also a bail risk".

In reviewing the decision of the district court, however, we are not so restricted by its grounds of decision. See Jaffke v. Dunham, 1957, 352 U.S. 280, 281, 77 S.Ct. 307, 1 L.Ed.2d 314; Texaco, Inc. v. Holsinger, 10 Cir. 1964, 336 F.2d 230, 233, cert. denied, 379 U.S. 970, 85 S.Ct. 669, 13 L.Ed.2d 563. After viewing the information forwarded to this Court with regard to national security, we hold that the district court was wrong in its belief that the Board erred in finding that Barbour was a security risk. Thus we affirm the district court on the ground that Barbour represents a threat to the security of this country. We do not reach the bail risk question.[2]

[4–6] It is not altogether clear on what basis the district court found "for the record" that Barbour did not present a threat to national security. It does seem from our view of the evidence, however, that in reaching that conclusion the court must have used an overly severe standard of review.[3] The Immigration and Naturalization Act of 1952 vests wide discretion in the Attorney General and his delegates to determine

2. We note in passing, however, that one who is a danger to national security may for that reason be a bad bail risk.

3. The district court apparently used the standard enunciated in section 106 of the Immigration and Nationality Act, that "the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive". 8 U.S.C. § 1105a(a)(4). This standard is explicitly applied to "judicial review of all final orders of deportation" and to certain determinations concerning nationality. There is no evidence from either the text of the Section or the legislative history, H.R.Rep.No.1086, 87 Cong. 1st Sess., 1961 U.S.Code Cong. & Admin.News, pp. 2950, 2966 2977, that Congress intended to overrule the more stringent standard established by the Supreme Court in Carlson v. Landon, 1952, 342 U.S. 524, 540-541, 72 S.Ct. 525, 96 L.Ed. 547, for bail cases. See infra.

whether or not to release an alien on bail pending a final decision in deportation proceedings. Section 242(a) of the Act provides in pertinent part:

> "Pending a determination of deportability in the case of any alien . . . , such alien may, upon warrant of the Attorney General, be arrested and taken into custody. Any such alien taken into custody may *in the discretion of the Attorney General*, and pending such final determination of deportability, (1) be continued in custody; or (2) be released under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (3) be released on conditional parole."

8 U.S.C. § 1252(a). (Emphasis supplied.) The wording in Section 242(a) is virtually identical to that in Section 23 of the Internal Security Act of 1950. In reviewing the legislative history of the earlier Act, the Supreme Court said: "[T]he language of the reports is emphatic in explaining Congress' intention to make the Attorney General's exercise of discretion presumptively correct and unassailable except for abuse. . . . [The discretion of the Attorney General] can only be overridden where it is clearly shown it 'was without reasonable foundation' ". Carlson v. Landon, 1952, 342 U.S. 524, 540 541, 72 S.Ct. 525, 534, 96 L.Ed. 547, quoting United States ex rel. Potash v. District Director, 2 Cir. 1948, 169 F.2d 747, 751. Courts that have reviewed decisions denying aliens bail since the 1952 Act have, apparently unanimously, transferred

4. The Attorney General is granted broad discretion to delegate his duties and powers under the Act. See 8 U.S.C. § 1103(a). The Attorney General has delegated virtually all his powers under Section 242(a) to the Board of Immigration Appeals. 8 C.F.R. 3.1(d) (1973). See infra.

the presumption to cases under that Act. See, e. g., United States ex rel. Belfrage v. Shaughnessy, 2 Cir., 212 F.2d 128 at 129; Application of Maringolo, S.D.N.Y.1969, 303 F.Supp. 1389, 1392. Under Section 242(a), therefore, an alien has a heavy burden to establish that the Attorney General abused

his discretion. See United States ex rel. Nukk v. District Director, 2 Cir. 1953, 205 F.2d 242, 244. The test established in the *Carlson* case is, we think, essentially that typically used in habeas corpus review of administrative action—whether there is any basis in fact for the agency's decision. See Developments in the Law—Habeas Corpus, 83 Harv.L.Rev. 1038, 1238–63 (1970). Here the evidence more than adequately supports the Board's finding that Barbour is a security risk.

[7–9] There is no question of the Attorney General's discretion under Section 242(a) of the Act to continue an alien in custody during deportation proceedings upon a properly-made determination that the release of an alien would be a danger to the national security of the United States. Carlson v. Landon, supra. Barbour contests, however, the manner in which that determination was reached by the Board. Barbour argued in his petition for habeas corpus, and he argues before this Court, that he was denied due process of law when the security risk information was presented ex parte to the Board without his having an opportunity to refute it. He contends also that the Board had no authority to consider evidence not presented to the Special Inquiry Officer; nor did it have authority to consider confidential information in connection with bail. He argues that the Board could not decide the issue of Barbour's being a national security risk when the issue at the hearing, as conceded by the Immigration and Naturalization Service, was solely whether Barbour was a bail risk.

[10] We reject these contentions. Discretionary relief—and release on bail is a form of discretionary relief—may be denied on the basis of confidential information, the disclosure of which would be prejudicial to the public interest, safety, or security, if the use of such information is sanctioned by regulations. Jay v. Boyd, 1956, 351 U.S. 345, 76 S.Ct. 919, 100 L.Ed. 1242; United States ex rel. Dolenz v. Shaughnessy, 2 Cir. 1953, 206 F.2d 392, 394 395. Regulations specifically provide that "[t]he determination of the special inquiry officer

as to custody status or bond may be based upon any information which is available to the special inquiry officer, or which is presented to him by the alien or the Service". 8 C.F.R. 242.2(b) (1973). Regulations also direct the Board of Immigration Appeals to "exercise such discretion and authority conferred upon the Attorney General by law as is appropriate and necessary for the disposition of the case." 8 C.F.R. 3.1(d) (1973). The Board therefore, may base its decision on any information available to it.

Affirmed.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

APPENDIX B

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1973

No. 73-1411

D.C. Docket No. SA-72-CA-367

UNITED STATES OF AMERICA, *ex rel.*,
MAMDOUH BARBOUR,
Petitioner-Appellant,

v.

DISTRICT DIRECTOR OF THE
IMMIGRATION AND NATURALIZATION SERVICE,
SAN ANTONIO, TEXAS, etc.,
Respondent-Appellee.

Appeal from the United States District Court for the Western District of Texas

Before WISDOM, COLEMAN and SIMPSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the

District Court appealed from, in this cause be, and the same is hereby, affirmed;

It is further ordered that petitioner-appellant pay to respondent-appellee, the costs on appeal to be taxed by the Clerk of this Court.

March 21, 1974

Issued as Mandate:

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA *ex rel.* MAMDOUH BARBOUR	:	
v.	:	SA-72-CA-367
DISTRICT DIRECTOR OF IMMIGRATION & NATURALIZATION SERVICE, SAN ANTONIO, TEXAS OR ANY OTHER PERSON HAVING SAID PETITIONER IN CUSTODY	:	

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

On the 17th day of January, 1973, came on for hearing and consideration the Petition for Writ of Habeas Corpus filed herein by Mamdouh Barbour on December 12, 1972. At the hearing additional testimony was presented by Petitioner. However, the Court, for the reasons set out at pages 6-7, *infra*, finds that it cannot consider this testimony in rendering its decision and hereby declines to do so. Accordingly, the Court, having considered the Petition, Briefs in support and in opposition thereto, the Record before the Immigration and Naturalization Service (Petitioner's Exhibit 2, hereinafter referred to as R.), and the comments of counsel, finds and rules as follows:

Petitioner brings this habeas corpus action seeking release on bail pending final determination of an order of deporta-

tion.[1] Petitioner is a native and citizen of Syria, and a Major in the Syrian Arab Army. (R. 178) On February 10, 1972, he left Syria and travelled to Lebanon and Turkey. He ultimately entered Canada on February 19, 1972. (R. 119-121) Shortly thereafter, petitioner deposited approximately $115,000.00 in four different Canadian banks. (R. 4) While in Canada, he appeared before an American Consular Officer at the Embassy of the United States at Ottawa, and executed an application for a non-immigration visa. In obtaining his non-immigrant visa, Barbour represented himself to the Consular Officer as Yousef S. Risk, a native of Lebanon and citizen of Jordan. In support of his application, the Petitioner presented a fraudulent passport issued by the Imamate of Oman State to Yousef S. Risk. Based on those representations, the Consular Officer issued Barbour a non-immigrant visa on March 1, 1972, which was valid for one applicatoin for admission into the United States. (R. 178-180) Using these false papers, Petitioner gained admission into the United States at Chicago, Illinois. (R. 227)

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[1] The government argues that Petitioner failed to properly request review of the bail question since the only relief requested in his petition is "that pending further proceedings, said District Director of the Immigration and Naturalization Service be enjoined and restrained from deporting or processing petitioner's deportation case." Of course, any requested action regarding the merits of the deportation proceedings is premature prior to exhaustion of administrative proceedings. *See United States ex rel. Potash v. District Dir. of Im. & Nat.*, 169 F.2d 747, 752 (2d Cir., 1948); *Marks v. Esperdy*, 198 F. Supp. 40, 43 (S.D.N.Y., 1961). However, it is clear from Petitioner's Brief and comments at oral argument that review of denial of bail is what is sought by this Petition, and this Court so construes it. Any other requested relief is denied.

Subsequent to Petitioner's entry into the United States, the Syrian Government, acting by and through Interpol, informed the Immigration and Naturalization Service that Petitioner's true name was Mamdouh Barbour and that a warrant for his arrest had been issued by the Syrian authorities on February 11, 1972, for escape abroad, smuggling of public funds, violation of military instructions and for misappropriation of two million Syrian pounds, the equivalent of which is $458,909.26. (R. 187-200; 214-219) Additionally, the Syrian Government initiated an action in Canadian courts for the return of the money deposited in banks there. According to the Syrian Government, Barbour was vice head of the Finance and Administration Department of his unit in the Army. His position, it is alleged, enabled him to embezzle the funds in his charge, and when it became apparent he would be discovered, he fled.

On May 24, 1972, Petitioner was apprehended by the Immigration and Naturalization authorities in Arlington, Texas, and jailed. (R. 179) On the same date, the Director of Immigration and Naturalization Service, the Respondent herein, commenced deportation proceedings against Petitioner by serving upon him a Warrant of Arrest, Order to Show Cause, and Notice of Hearing. The Order to Show Cause charges that Barbour is subject to deportation as an alien who is excludable at the time of entry because he was not in possession of a valid passport. (R. 169-170) The Service also served a Form I-286, advising Barbour that pending a final determination of deportability, he would be detained in the custody of the Immigration and Naturalization Service. (R. 34)

On June 1, 1972, Barbour, acting through his attorney of record, submitted an application for political asylum, claiming that his deportation to Syria would subject him

to persecution on account of his political opinions. In order to obtain additional information concerning the claim, the Petitioner was interviewed by an Immigration Officer at Dallas, Texas. On June 2, 1972, Barbour's affidavit, dated June 1, 1972, presented in support of his application for political asylum, together with the report of the examining Immigration Officer, was sent to the Office of Refugee and Migration Affairs, Department of State, Washington, D.C. In a reply dated June 29, 1972, the Department of State informed the Immigration and Naturalization Service that Barbour had not established that he would suffer persecution should he be deported to Syria. (R. 171-180)

On June 6, 1972, the Petitioner made a request for a custody redetermination hearing; this was granted. In a decision of the same date, the Special Inquiry Officer ordered that Barbour's request for change in custody status be denied. No appeal was taken from this decision. (R. 32-70)

By letter dated July 17, 1972, the Respondent advised Barbour that his request for political asylum had been denied. He was further advised: "The denial of this application is without prejudice to your applying for withholding of deportation under Section 243(h) of the Immigration and Nationality Act during the course of your deportation hearing before the Special Inquiry Officer." (R. 171-172)

At deportation hearings held on July 21, 1972, and August 4, 1972, Barbour, through counsel, admitted the factual allegations set forth in the District Director's Order to Show Cause and conceded that he was subject to deportation as charged therein. During the course of the hearing, he submitted an application for stay of deportation, pursuant to Section 243(h) of the Immigration and Nationality Act, 8 U.S.C. 1253(h), claiming that he would be sub-

ject to persecution in Syria on account of his political opinions. (R. 82-84)

On August 14, 1972, Respondent forwarded the entire record of proceeding, including the transcript of hearings and exhibits, to the Office of Refugee and Migration Affairs, Department of State, Washington, D.C., and requested the Department of State's comments upon the question of whether Barbour's deportation to his native country would subject him to persecution because of his political opinions. (R. 229-230) The views of the Department of State were received (R. 231), and on September 8, 1972, the Special Inquiry Officer rendered the decision ordering Barbour's deportation to Brazil or, alternatively, to Jordan or Syria, and denied his application for withholding of deportation pursuant to Section 243(h) of the Immigration and Nationality Act, 8 U.S.C. 1253(h). (R. 75-78)

Barbour appealed to the Board of Immigration Appeals on September 19, 1972, from the decision of the Special Inquiry Officer. (R. 72-73) Also, Barbour submitted another request to the Special Inquiry Officer, pursuant to 8 C.F.R. 242.2(b), for redetermination of custody status. An informal telephonic hearing was held on September 28, 1972, and the Petitioner agreed, by counsel, that the transcript of the bond proceeding of June 6, 1972, and the entire record of proceeding in the deportation case be made part of the record in the second bond proceeding. (R. 23-31) By decision dated October 5, 1972, the Special Inquiry Officer ordered that no change be made in Barbour's custody status. (R. 24-25) This decision was appealed to the Board of Immigration Appeals. (R. 22-23)

On October 17, 1972, the Board of Immigration Appeals heard oral argument on the appeal from denial of bail. At that time, counsel for the Immigration and Naturaliza-

tion Service stated that Petitioner was no security risk. (R. 16) After the case was taken under advisement, the Board received a letter dated October 27, immigration cases pending deportation proceedings. *United States ex rel. Kordic v. Esperdy*, 279 F. Supp. 880 (S.D.N.Y., 1967); see *Petition of Johnson*, 72 S.Ct. 1028 (1952); *Yanish v. Barber*, 73 S.Ct. 1105 (1953); The Immigration & Nationality Act of 1952, §242(a). The Immigration and Nationality Act specifies that an alien apprehended in deportation proceedings may, in the discretion of the Attorney General, be continued in custody or released on bail. 8 U.S.C. §1252(a). The Attorney General is authorized by 8 U.S.C. §1103 to delegate his authority in this area to "any employee of the Immigration & Nationalization Service." The Attorney General has done so in 8 C.F.R. §242.2(b):

> [A]t any time before a deportation order becomes administratively final, upon application by the respondent for release from custody or for amelioration of the conditions under which he may be released, a special inquiry officer may exercise the authority contained in Section 242 [8 U.S.C. §1252] of the Act to continue or detain a respondent, in, or lease him from, custody, and to determine whether a respondent shall be released under bond, and the amount thereof, if any.

Thus, the Special Inquiry Officer is invested with discretion in the matter of bail.

The Immigration Act authorizes judicial review of "any determination of the Attorney General [or his deligate] concerning detention, release on bond, or parole pending final decision of deportability upon a conclusive showing in habeas corpus proceedings that the Attorney General is

not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances of the case . . . ." It could, and has, been argued that the Act should be read narrowly to restrict judicial review to only those cases where there is an allegation that the Attorney General has not proceeded "with reasonable dispatch." The Courts, however, have rejected that argument and held that the passage of the 1952 Act did not alter the previous standard of review. That standard is that the Attorney General's exercise of discretion could "be overturned only on a showing of clear abuse" by demonstrating that the denial "was without reasonable foundation." *Carlson v. Landon*, 342 U.S. 524, 540-41 (1952); *United States ex rel. Potash v. District Director of Im. & Nat., supra; United States ex rel. Belfrage v. Shaughnessy*, 212 F.2d 128, 129 (2d Cir., 1954); C. Gordon & H. Rosenfield, *Immigration Law & Procedure*, §8.16(a) at 8-106 (1972). Judge Frankel recently restated the law:

> [D]ecisions of the Attorney General's delegates on bail pending deportation proceedings may be set aside only for abuse of discretion [citing the above cases], or for fundamental errors of law affecting the scope of the supposed discretion, cf. *McGrath v. Kristensen*, 340 U.S. 162 (1950); or the lawful manner of exercising it, *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954) . . . .

Application of Maringolo, 303 F. Supp. 1389, 1392 (S.D.-N.Y. 1969).

In reviewing an exercise of discretion, the Court must not substitute its judgment for that of the Attorney General's. Review is limited to ascertaining if there is substantial evidence in the record to support the factual basis

upon which his discretionary decison rests. For this reason, no trial *de novo* may be held. *See Jarecha v. Immigration & Nat. Serv.*, 417 F.2d 220, 224-25 (5th Cir. 1969). "Since the Attorney General's actions are presumptively lawful, the burden is on the alien to support any charges of arbitrariness." 2 C. Gordon & H. Rosenfield, *supra*, at 8-107, citing *United States ex rel. Nukk v. District Director*, 205 F.2d 242, 244 (2d Cir., 1953).

II

DENIAL OF BAIL WAS NOT AN ABUSE OF DISCRETION

A review of the record as a whole convinces this Court that the Attorney General's decision to deny bail to Petitioner was not arbitrary, capricious, or without reasonable foundation. In so concluding, this Court does not rely on, nor has it considered, the matters presented to it *in camera* relating to national security. Nor are the bare allegations contained in the letter of October 27, 1972, from the Office of Refugee and Migration Affairs determinative. Were those materials the exclusive evidence presented by the Attorney General for denying bail, the Court would have to find an abuse of discretion. For the record, the Court finds that Petitioner is not a security risk.[2]

Rather, the Court bases its decision upon the evidence presented to the Special Inquiry Officer from which he determined Petitioner was not a good bail risk. "[T]he requirements of due process . . . are met if the written decision of the administrative agency or the record of the

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[2] Unquestionably the Attorney General can rely on confidential information in making a discretionary judgment not to release an alien on bail pending deportation proceedings. *See Jay v. Boyd,*

(continued)

administrative hearing set out clearly the ground which forms the basis for the denial of discretionary relief, so that the appellate bodies within the agency and the reviewing courts are able to ascertain whether [sic: the] decision is arbitrary, capricious or not supported by the 'reasonable, substantial and probative evidence on the record considered as a whole.' " *Jarecha v. Immigration & Nat. Serv., supra,* 417 F.2d 225. That requirement is clearly met in this case.

A review of the record reflects that the Special Inquiry Officer considered the following factors in denying bail to Petitioner:

(1) Petitioner was, without question, illegally present in this country, and was therefore subject to deportation in that he was excludable at the time of entry for not being in possession of a valid passport (8 U.S.C. 1182(a)(26)). (R. 178-180)

(2) Barbour deceived the American Consular Officer at Ottawa, Canada, when he appeared before such officer to execute his application for a non-immigrant visa. He falsely represented that he was one Yousef S. Risk, a native of Lebanon and a citizen of Jordan. (R. 36-37, 178-180)

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[2] (continued) 351 U.S. 345, 354 (1956); *United States ex rel. Dolenz v. Schaughnessy,* 206 F.2d 392, 394-95 (2d Cir. 1953). And the Courts will not disturb this determination if based upon substantial evidence. Likewise, the Board of Immigration Appeals can consider such information regardless of whether it was first presented to the Special Inquiry Officer. *Noverola-Bolaina v. Immigration & Nat. Serv.,* 395 F.2d 131 (9th Cir. 1968); *Matter of N-,* 9 I&N Dec. 506 (BIA 1961). However, in this instance, the material in itself does not reasonably or substantially support grounds for denial of bail.

(3) The Petitioner arrived in the United States at Chicago, Illinois, carrying a false travel document and claiming a false identity. (R. 36, 227) In a very real sense this was a surreptitious entry, and Petitioner thus revealed himself as a person likely to conceal himself within the society.

(4) The Petitioner did in fact conceal himself within the society under his false identity. In furtherance of his scheme, he purchased an automobile and rented an apartment using his alias name. In addition, he represented himself to the public, the authorities, and in particular to a couple who befriended him, as Yousef Risk. (R. 45, 57) Barbour also admitted that he deposited approximately $110,000.00 in four Canadian banks in the name of Yousef Risk. (R. 38, 50-70)

(5) Barbour has no close family ties or roots in this country. (R. 50-51)

(6) Barbour has no employment record in this country.

(7) The Petitioner was under an outstanding warrant of arrest issued by the Syrian Government on February 11, 1972, on a charge that he, as vice-head of the Finance and Administrative Department of his unit in the Syrian Arab Army, had embezzled the equivalent of $458,909.26. (R. 43, 187-200)

(8) Barbour was under an outstanding warrant of arrest issued by the Syrian military authorities for desertion from the Syrian Army. (R. 49, 187-200)

(9) Criminal charges have been brought against the Petitioner for: (a) desertion from the army; (b) embezzlement of public funds in the amount of $458,909.26; and (c) smuggling monies abroad. (R. 214-226)

(10) A substantial amount of cash is unaccounted for which, under the circumstances, Petitioner could use for abscond. Although the Special Inquiry Officer did not write a memorandum opinion, the following remarks from the record clearly establish his reasons:

> I am going to order that the change in custody be denied at this time. The record shows the respondent has used different identities, fraudulent documents. He does not have any close relatives or property in the United States, although it was pointed out that the money that he has in banks might be held in some way, and he would not leave his money, but then of course, we do not know at this time how many other banks he might have money in in other countries and what the risk is, and I would hesitate today in setting what I consider to be an intelligent bond in the case for his release under bond. (R. 68-69)

There is substantial evidence in the record to support the Officer's reasons. Nor could such reasoning be considered an abuse of discretion. It takes into consideration factors upon which the Attorney General can reasonably base his discretion. *See United States ex rel. Potash v. District Director, supra,* 169 F.2d at 751. Likewise, it is within the spirit of the Bail Reform Act of 1966, 18 U.S.C. §3146 *et seq.*, which, although not applicable, has been considered by Courts recently in determining whether the Attorney General abused his discretion in alien bail matters. *E.G. Application of Maringolo, supra,* 303 F. Supp. at 1390; *United States ex rel. Kordic v. Esperdy,* 279 F. Supp. 880 (S.D.N.Y. 1967).

Accordingly, the Writ of Habeas Corpus is hereby, in all things, DENIED, and IT IS SO ORDERED.

Entered this 23rd day of January.

/s/ D.W. SUTTLE
D.W. Suttle
United States District Judge

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1668

MAMDOUH BARBOUR, PETITIONER

v.

DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner attacks the court of appeals' affirmance of the district court's denial of his habeas corpus motion for admission to bail pending deportation proceedings. He contends that confidential information was improperly used to determine that he was a national security risk and not entitled to bail.

Petitioner is a native and citizen of Syria, and a major in the Syrian Army (R. 178).[1] He left Syria on February 10, 1972, and entered Canada on February 19, 1972 (R. 119-121). Shortly thereafter, petitioner deposited approximately $115,000 in four different Canadian banks (R. 4). On March 4, 1972, he entered the United

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[1] "R." denotes the administrative record of the Immigration and Naturalization Service relating to petitioner.

States at Chicago, Illinois, on a non-immigrant visa based on a fraudulent passport issued by the Imamate of Oman State to Yousef S. Risk (R. 178-180, 227).

Subsequent to petitioner's entry into this country, the Syrian government, acting through Interpol, informed the Immigration and Naturalization Service that petitioner's true name was Mamdouh Barbour and that a warrant for his arrest had been issued by Syrian authorities on February 11, 1972, for escape abroad, smuggling of public funds, violation of military instructions, and misappropriation of two million Syrian pounds, the equivalent of $458,909.26. The Syrian government also began proceedings in Canada to recover the money deposited there. The Syrian government alleged that petitioner was vice head of the Finance and Administration Department of his army unit[2], that he had embezzled funds in his possession, and that when it became apparent that he would be discovered, he fled the country (R. 187-200; 214-219).

On May 24, 1972, petitioner was apprehended by the Immigration and Naturalization authorities in Arlington, Texas, and deportation proceedings begun (R. 169-170, 179). Petitioner was notified that he would be retained in custody pending final determination of deportability (R. 34). Petitioner submitted an application for stay of deportation, pursuant to 8 U.S.C. 1253(h), claiming that he would be subject to persecution in Syria because of his political beliefs (R. 171-180).

On August 14, 1972, the record of proceedings before a Special Inquiry Officer was forwarded to the Office of Refugee and Migration Affairs of the Department of

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[2]The court of appeals stated that petitioner was assigned to SAIQA, a Syrian supported military arm of the Palestinian resistance, said to have connections with worldwide terrorist organizations (Pet. App. 2a).

State with a request for comments as to whether petitioner's deportation would subject him to persecution because of his political opinions. The Department of State responded that petitioner had not established that he would be subject to political persecution if returned to Syria (R. 231-232). On September 8, 1972, the Special Inquiry Officer found petitioner deportable as charged and denied his application for withholding of deportation (R. 75-78).[3]

Petitioner appealed to the Board of Immigration Appeals on September 19, 1972, from the decision of the Special Inquiry Officer (R. 72-73). He also requested redetermination of his custody status and allowance of bond, pursuant to 8 C.F.R. 242.2(b). By decision dated October 5, 1972, the Special Inquiry Officer ordered that no change be made in petitioner's custody status (R. 24-25). This decision was also appealed to the Board of Immigration Appeals (R. 22).

On October 17, 1972, the Board of Immigration Appeals heard argument on the appeal from denial of bail. At that time, counsel for the Immigration and Naturalization Service stated that petitioner was not a security risk (R. 16). After the case was taken under advisement, the Board received a letter dated October 27, 1972, from the Office of Refugee and Migration Affairs, Department of State, recommending that petitioner not be set free on bail. That recommendation was based upon information from "intelligence sources" that petitioner was assigned to serve with the Syrian supported military arm of the Palestinian resistance movement. On the basis of this information, and other material in the form of classified

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[3]In accordance with petitioner's stated choice, he was ordered deported to Brazil or alternately, if that country will not accept him, to Jordan or Syria (R. 78).

information, specifically required to be kept secret by Executive Order 11652, 37 Fed. Reg. 5209, the Board of Immigration Appeals held that petitioner's release on bail would endanger the national security of the United States (R. 2-7). Accordingly, on November 24, 1972, the Board dismissed the appeal on the bond proceedings. The Board declined to rule on whether petitioner was a good bail risk absent the security issue.[4]

On December 12, 1972, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Texas. The district court reviewed *in camera* the various confidential documents relating to whether petitioner was a security risk, but did not consider or rely upon these documents in its order of January 23, 1973, denying the application for relief (Pet. App. 20a). The district court specifically found that petitioner was not a security risk (as the Board of Immigration Appeal had found) but concluded that he was not a good bail risk (Pet. App. 20a-24a). Accordingly, the court held that the Attorney General's decision to deny bail was not an abuse of discretion.

The court of appeals affirmed (Pet. App. 11a). In its view, review of the administrative determination to deny bail is limited solely to the reason advanced by the Board of Immigration Appeals, that petitioner was a security risk (Pet. App. 6a).[5] Based on an *in camera* inspection of the confidential information relied upon by the Board, the court of appeals concluded that there was ample basis for finding that petitioner was a security risk (Pet. App. 7a-10a).

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[4]In a separate decision, the Board remanded the deportation case to the Special Inquiry Officer for further hearing on the issue of persecution. This issue is still pending.

[5]The court of appeals noted that while the appeal was pending, the Board of Immigration Appeals, in proceedings initiated by petitioner, found that petitioner was also a bail risk (Pet. App. 6a).

Petitioner contends (1) that the denial of bail pending deportation proceedings based on confidential information constitutes a violation of due process and (2) that the Board of Immigration Appeals is not authorized to utilize confidential information to deny bail. These claims were thoroughly considered and properly rejected by the court of appeals, in an opinion on which we rely. The court stated (Pet. App. 7a-10a):

> It is not altogether clear on what basis the district court found "for the record" that Barbour did not present a threat to national security. It does seem from our view of the evidence, however, that in reaching that conclusion the court must have used an overly severe standard of review. The Immigration and Naturalization Act of 1952 vests wide discretion in the Attorney General and his delegates to determine whether or not to release an alien on bail pending a final decision in deportation proceedings. Section 242(a) of the Act provides in pertinent part:
>
> "Pending a determination of deportability in the case of any alien * * *, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. Any such alien taken into custody may *in the discretion of the Attorney General,* and pending such final determination of deportability, (1) be continued in custody; or (2) be released under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (3) be released on conditional parole."

8 U.S.C. §1252(a). (Emphasis supplied.) The wording in Section 242(a) is virtually identical to that in Section 23 of the Internal Security Act of 1950. In reviewing the legislative history of the earlier Act, the Supreme Court said: "[T]he language of the reports is emphatic in explaining Congress' intention to make the Attorney General's exercise of discretion presumptively correct and unassailable except for abuse. * * * [The discretion of the Attorney General] can only be overridden where it is clearly shown it 'was without reasonable foundation' ". *Carlson* v. *Landon,* 1952, 342 U.S. 524, 540-541, 72 S. Ct. 525, 534, 96 L. Ed. 547, quoting *United States ex rel. Potash* v. *District Director,* 2 Cir. 1948, 169 F. 2d 747, 751. Courts that have reviewed decisions denying aliens bail since the 1952 Act have, apparently unanimously, transferred the presumption to cases under that Act. See, e.g., *United States ex rel. Belfrage* v. *Shaughnessy,* 2 Cir., 212 F. 2d 128 at 129; *Application of Maringolo,* S.D.N.Y. 1969, 303 F. Supp. 1289, 1292. Under Section 242(a), therefore, an alien has a heavy burden to establish that the Attorney General abused his discretion. See *United States ex rel. Nukk* v. *District Director,* 2 Cir. 1953, 205 F. 2d 242, 244. The test established in the *Carlson* case is, we think, essentially that typically used in habeas corpus review of administrative action —whether there is any basis in fact for the agency's decision. See *Developments in the Law—Habeas Corpus,* 83 Harv. L. Rev. 1038, 1238-63 (1970). Here the evidence more than adequately supports the Board's finding that Barbour is a security risk.

There is no question of the Attorney General's discretion under Section 242(a) of the Act to continue an alien in custody during deportation proceedings upon a properly-made determination that the release of an alien would be a danger to the national security of the United States. *Carlson* v. *Landon, supra.* Barbour contests, however, the manner in which that determination was reached by the Board. Barbour argued in his petition for habeas corpus, and he argues before this Court, that he was denied due process of law when the security risk information was presented *ex parte* to the Board without his having an opportunity to refute it. He contends also that the Board had no authority to consider evidence not presented to the Special Inquiry Officer; nor did it have authority to consider confidential information in connection with bail. He argues that the Board could not decide the issue of Barbour's being a national security risk when the issue at the hearing, as conceded by the Immigration and Naturalization Service, was solely whether Barbour was a bail risk.

We reject these contentions. Discretionary relief— and release on bail is a form of discretionary relief— may be denied on the basis of confidential information, the disclosure of which would be prejudicial to the public interest, safety, or security, if the use of such information is sanctioned by regulations. *Jay* v. *Boyd,* 1956, 351 U.S. 345, 76 S.Ct. 919, 100 L.Ed. 1242; *United States ex rel. Dolenz* v. *Shaughnessy,* 2 Cir. 1953, 206 F. 2d 392, 394-395. Regulations specifically provide that "[t]he determination of the special inquiry officer as to custody status or bond may be based upon any information which is available to the

special inquiry officer, or which is presented to him by the alien or the Service." 8 C.F.R. 242.2(b) (1973). Regulations also direct the Board of Immigration Appeals to "exercise such discretion and authority conferred upon the Attorney General by law as is appropriate and necessary for the disposition of the case." 8 C.F.R. 3.1(d) (1973). The Board therefore, may base its decision on any information available to it.[6]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1974.

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[6]Contrary to petitioner's claim, the decision of the District of Columbia Circuit in *Han-Lee Mao* v. *Brownell*, 207 F. 2d 142 (C.A.D.C.), is not in conflict with the holding here. There, a Chinese alien sought injunctive relief from an order of the Attorney General which denied him permission to return to mainland China. The Immigration and Naturalization Service had denied Mao permission to return to China as that country's armies were engaged in hostilities with United States military forces in Korea and Mao's training and education might be utilized by enemy forces. *Id.* at 144-145. The court of appeals held that Mao was entitled to a hearing before he could be detained against his will. *Id.* at 147. The court in *Mao* did not indicate the procedural requirements that must exist at the subsequent hearing nor did they hold that confidential information relating to national security must be released to satisfy the dictates of due process. Here, as we have noted, petitioner is entitled to and has received a full and fair hearing in compliance with the requirements of *Mao*. Accordingly, no conflict exists between the two holdings.